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Supreme Court, U.S.
FILED

(D)

No. 061296

MAR 12 2007

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IN THE
SUPREME COURT OF THE UNITED STATES

ALEJO COVARRUBIAS,
Petitioner
v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional institutions Division,
Respondent

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misapplied the standard for granting a certificate of appealability after the federal district court erred in concluding that the state court decision that petitioner received the effective assistance of counsel on appeal was not contrary to or an unreasonable application of Supreme Court precedent.

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Alejo Covarrubias respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit denying a motion for a certificate of appealability.

OPINION BELOW

The order of the Fifth Circuit denying a certificate of appealability is not reported. (Appendix A).

JURISDICTION

The Court of Appeals denied the motion for a certificate of appealability on December 12, 2006. This petition is being filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

28 U.S.C. § 2253(c)(1)(A) provides, in pertinent part, "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . ."

28 U.S.C. § 2253(c) (2) provides, in pertinent part, "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

A. SUMMARY OF THE ISSUE

The jury rejected petitioner's defense that he shot Mendez in defense of Raymundo, convicted him murder, and assessed his punishment at 55 years in prison. The jury acquitted Raymundo on the basis of self-defense, establishing that the homicide was justified. Direct appeal counsel in state court failed to raise whether the evidence was legally insufficient to sustain petitioner's murder conviction where the jury found that the co-defendant lawfully killed the deceased in self-defense. Had appellate counsel raised this issue, there is a reasonable probability that a state appellate court would have reversed petitioner's murder conviction and entered a judgment of acquittal. Petitioner urges below that jurists of reason could disagree with the federal district court's resolution of his constitutional claim or that jurists could conclude the issue presented is adequate to deserve encouragement to proceed further. The Court of Appeals misapplied the standard upon denying petitioner a certificate of appealability.

B. STATEMENT OF FACTS

Petitioner and his brother, Raymundo Covarrubias, were at a bar in Houston on the night of December 6, 1997. They argued with some people as they were leaving in their respective vehicles. According to Edmundo Tijerina, the owner of the bar, petitioner got out of his truck carrying a gun, walked to a truck driven by Rosendo Rodriguez, and tapped on the window with the gun. Petitioner then saw Raymundo fighting with Rogelio Mendez in the parking lot, ran toward them, and fired once at Mendez, who was standing. Mendez fell to the ground, pulling Raymundo with

him. Raymundo took a knife from his jacket pocket and began stabbing began stabbing Mendez as they fought on the ground. Petitioner shot Mendez as he lay on his back and then grabbed him by the hair and shot him in the head at close range.

Petitioner testified that, while he was talking to Rodriguez, he saw two men running toward his truck; the closest man, Mendez, grabbed Raymundo and hit him in the head, knocking him to the ground. Mendez sat on top of Raymundo, hitting him. Petitioner retrieved a gun from his truck and shot Mendez.

Dr. Tommy Brown, a pathologist, testified that Mendez had been stabbed eight times; a stab wound to his spleen was fatal. Mendez had been shot in the upper back, upper abdomen, and forehead; the latter two wounds were also fatal. The stab wound to the spleen was sufficient to cause death even had Mendez not been shot.

The court instructed the jury on self-defense as applied to Raymundo and on defense of a third person as applied to petitioner. The jury acquitted Raymundo on the basis of self-defense but convicted petitioner of murder.

C. PROCEDURAL HISTORY

Petitioner was charged with murder in state court. Petitioner's brother, Raymundo Covarrubias, was charged with the same murder. They pled not guilty and were tried together in the 183rd District Court of Harris County, Texas. The jury acquitted Raymundo on the ground of self-defense, convicted petitioner, and assessed his punishment at 55 years in prison.

The Fourteenth Court of Appeals of Texas affirmed petitioner's conviction in an unpublished opinion issued on August 31, 2000. The Texas Court of Criminal Appeals refused discretionary review on February 7, 2001.

Covarrubias v. State, No. 14-99-459-CR (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The same lawyer represented petitioner at trial and on appeal in state court.

Petitioner filed a state habeas corpus application on April 11, 2002. The state district court, without an evidentiary hearing, recommended that relief be denied. The Texas Court of Criminal Appeals denied relief without written order on November 10, 2004. Ex parte Covarrubias, No. WR-58,237-01 (Tex. Crim. App. 2004).

Petitioner filed a federal habeas corpus petition on November 24, 2004. The district court denied relief and a certificate of appealability on March 9, 2006. Covarrubias v. Dretke, 2006 WL 623573 (S.D. Tex. 2006). The United States Court of Appeals for the Fifth Circuit denied petitioner's motion for a certificate of appealability on December 12, 2006.

REASONS FOR GRANTING THE PETITION

The Court of Appeals misapplied the standard for granting a certificate of appealability after the federal district court erred in concluding that the state court decision that petitioner received the effective assistance of counsel on appeal was not contrary to or an unreasonable application of Supreme Court precedent.

A defendant may not appeal a final order in a 28 U.S.C. § 2254 proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c) (1) (A). To obtain a certificate of appealability, the defendant must make a "substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c) (2). The defendant must demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Miller-El v.

Cockrell, 537 U.S. 322, 327 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

In determining whether to grant a certificate of appealability, the district court and court of appeals are limited to a threshold inquiry into the underlying merit of the defendant's claims. Miller-El, 537 U.S. at 327. The threshold inquiry does not require full consideration of the factual and legal bases adduced in support of the claims. Instead, the determination is based on an overview of the claims in the habeas petition and a general assessment of their merits. Id. At issue is the debatability of the underlying constitutional claim, but not the resolution of that debate. Miller-El, 537 U.S. at 342. A claim can be debateable even though every jurist of reason might agree, after the certificate has been granted and the case has received full consideration that the petitioner will not prevail. Miller-El, 537 U.S. at 338.

An appellant in a criminal case is entitled to the effective assistance of counsel on appeal. U.S. CONST. amends.VI and XIV; Evitts v. Lucey, 469 U.S. 387, 394-396 (1985). The standard of Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing of deficient performance and prejudice, applies in the appellate context. Smith v. Robbins, 528 U.S. 259, 285 (2000). Thus, petitioner must show that appellate counsel unreasonably failed to raise an issue that would have resulted in reversal of the conviction. Id. at 285. Counsel is not required to raise a nonfrivolous issue that, in his professional judgment, will not result in reversal of the conviction. Jones v. Barnes, 463 U.S. 745, 751 (1983).

Petitioner's state appellate counsel provided an affidavit in the state habeas proceeding admitting that he did not consider or research the issue which petitioner now maintains he should have raised on appeal. Thus, petitioner

is entitled to an out-of-time appeal if there is a reasonable probability that a state appellate court would have reversed the conviction had this issue been raised.

The Fourteenth Amendment Due Process Clause of the United States Constitution requires the reversal of a conviction based on legally insufficient evidence. Jackson v. Virginia, 443 U.S. 307 (1979). Petitioner's murder conviction violated due process because the jury finding that the homicide was justified meant that no crime was committed. Stated otherwise, petitioner could not properly be convicted of murdering a man who was lawfully killed by the co-defendant. The district court rejected this argument for three reasons; none can withstand scrutiny or should have served as the basis for the court of appeals to deny a certificate of appealability.

The district court first found that the record does not establish that the jury necessarily acquitted Raymundo on the basis of self-defense; the jury could have decided that the State simply failed to prove beyond a reasonable doubt that Raymundo killed Mendez. On the contrary, Raymundo testified that he repeatedly stabbed Mendez, and the pathologist testified that the stab wound to Mendez's spleen was sufficient to cause death even had he not been shot. Furthermore, Raymundo's counsel argued during summation that Raymundo was defending himself when he stabbed Mendez—that Raymundo was in danger from an attack by Mendez; could not retreat because Mendez, who was 30 pounds heavier, was on top of him; and that the stab wounds all over Mendez's body were consistent with "defensive, glancing blows" to get Mendez off of him. Had the jury not believed that Raymundo acted in self-defense, it would have convicted him of murder under the law of parties, even if it rejected the pathologist's opinion that the stab wound to the spleen was fatal. Thus, the only logical conclusion is that the

acquittal was based on self-defense.[1]

The district court next found that the jury could have decided that Raymundo was justified in defending himself but that petitioner was not justified in defending Raymundo; that is, that the defenses of self-defense and defense of a third person are mutually exclusive. Obviously, that is exactly what the jury decided. However, that begs the question, which is whether it is constitutionally permissible to uphold the murder conviction of a person who used deadly force to defend another person who lawfully had the right to defend himself.

Finally, the district court concluded that, even if the jury acquitted Raymundo on the basis of self-defense, that verdict does not legally require petitioner's acquittal; that is, there is no constitutional violation rooted in inconsistent verdicts. Therein lies the ultimate question. Raymundo's acquittal on the basis of self-defense established that the homicide was legally justified. A judicial determination that Raymundo had a right to kill Mendez renders the evidence insufficient to sustain petitioner's murder conviction.

"Where the commission of a single crime is charged, it is clear that a jury cannot acquit the principal and yet find his co-defendant guilty of being an accessory to the commission of the crime it found had not been committed." People v. Allsip, 74 Cal. Rptr. 550, 551 (Cal. App. 1969). In Allsip, two defendants were tried together for rape and aiding and abetting each other. The co-defendant was acquitted of both counts; the defendant was acquitted of rape but convicted of aiding and abetting the co-defendant. The conviction for aiding and abetting was reversed because the jury, by acquitting the co-defendant, determined that no rape

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[1] Petitioner could not present affidavits or testimony from the jurors to explain the reason for the acquittal, as Texas Rule of Evidence 606(b)—like its federal counterpart—prohibits the admission of a juror's testimony or affidavit regarding the basis for a verdict.

had occurred.

The district court acknowledged that Raymundo's acquittal for stabbing Mendez could, under Allsip, possibly call into question a conviction of petitioner for aiding and abetting Raymundo, but Allsip was distinguishable because petitioner personally shot Mendez. The district court's rationale is questionable. If a defendant's conviction cannot be upheld for aiding and abetting a crime that the jury determined the co-defendant did not commit, a defendant's conviction cannot be upheld for murder when the jury determined the co-defendant lawfully killed the deceased in self-defense.[2]

Self-defense and defense of a third person are harmonious, mutually consistent defensive theories, as "a finding that one had killed the victim in justification or self-defense would acquit the other as well." State v. Snodgrass, 346 N.W.2d 472, 477 (Iowa 1984). The district court concluded that petitioner's reliance on Snodgrass was misplaced because that court was addressing whether a joint trial would prejudice the defendants rather than the constitutionality of a conviction of one defendant for murder where the jury acquitted the co-defendant on the basis of self-defense. However, the rationale of the Snodgrass Court is unassailable.

Petitioner recognizes that this Court has never required consistent verdicts. See Hamling v. United States, 418 U.S. 87, 101 (1974). However, petitioner's case is not about inconsistent verdicts—it is about whether a defendant

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[2] Johnny Holmes, the long-time former district attorney of Harris County, was often asked by the media to explain why police officers, purportedly acting in self-defense, could lawfully shoot an unarmed man multiple times, especially after reloading their weapons. Holmes would always reply, "An analogy that I use is that if it is okay to kill a guy dead, it is okay to kill him dead, dead, dead." Alan Bernstein, *Holmes often a blunt instrument of the law*, Houston Chronicle, Section A at 25 (October 13, 1999).

can properly be convicted of murdering a man who was lawfully killed by the co-defendant. Because the pathologist testified that the stab wound to the spleen inflicted by Raymundo was sufficient to cause death even had Mendez not been shot, and the jury found that Raymundo lawfully killed Mendez in self-defense, petitioner committed no crime by shooting, in essence, a man lawfully killed by another. He would have been entitled to an acquittal had appellate counsel raised this issue.

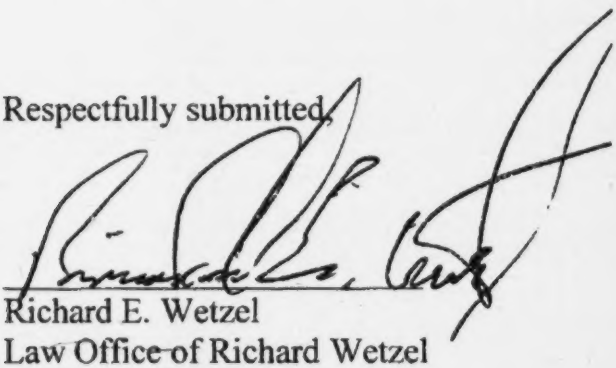
The state court decision that appellate counsel was effective was contrary to Smith v. Robbins, supra, and Evitts v. Lucey, supra, and constituted an unreasonable application of Jones v. Barnes, supra. The district court erroneously found otherwise upon denying federal habeas corpus relief and a certificate of appelability.

Petitioner urges that jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issue presented is adequate to deserve encouragement to proceed further. The Court of Appeals denial of a certificate of appealability is contrary to and a misapplication of Miller-El v. Cockrell, supra, and Slack v. McDaniel, supra.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari, vacate the order of the Fifth Circuit, and remand to the Fifth Circuit for consideration of the claim presented concerning the denial of the effective assistance of counsel on direct appeal.

Respectfully submitted,



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APPENDIX

Appendix A

Order of the United States Court of Appeals
For the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20279
USDC No. 4:04-CV-4488

ALEJO COVARRUBIAS,

Petitioner-Appellant,

versus

U.S. COURT OF APPEALS
FILED
DEC 12 2006
CHARLES R. FULBRUGE III
CLERK

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

O R D E R :

Alejo Covarrubias seeks a certificate of appelability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition challenging his murder conviction. He argues that counsel was ineffective for failing to argue on direct appeal that the evidence was insufficient to support his conviction where the jury found his codefendant not guilty on the same charge.

Covarrubias has not shown "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." See Slack v.

McDaniel, 529 U.S. 473, 484 (2000). His motion for COA is DENIED.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDAL
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED

No. (2) 061296 MAR 12 2007

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ALEJO COVARRUBIAS,
Petitioner
v.
NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional institutions Division,
Respondent

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

Memorandum and Order
United States District Court
For the Southern District of Texas
Houston Division

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALEJO COVARRUBIAS,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H-04-4484
DOUG DRETKE,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

Pending before this Court is a Motion for Summary Judgment filed by Doug Dretke, Director of the TDCJ-CID. Based on consideration of the pleadings, the motion, the record, and the applicable law, this Court GRANTS the motion.

I. BACKGROUND AND CLAIMS

Petitioner, Alejo Covarrubias, filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is incarcerated in the TDCJ-CID. He is serving a sentence in cause number 770221 in the 183rd District Court of Harris County, Texas.

Petitioner was indicted for murder. Petitioner's brother, Raymundo Covarrubias, was charged with the same murder. They pled not guilty and were tried together. On January 11, 1999, the jury found Petitioner guilty and sentenced him to 55 years imprisonment in the TDCJ-CID. The jury acquitted Raymundo.

Petitioner filed a state application for a writ of habeas corpus under Article 11.07 under Texas Code of Criminal Procedure challenging his conviction. See Ex Parte Covarrubias, Application No. 58,237-01, State Habeas Record (HR). Petitioner raised his federal claims in the state habeas corpus application. The application was denied without written order on November 10, 2004. Id., at cover.

Petitioner raised these grounds for relief in his Original Petition:

> 1. Petitioner was denied the effective assistance of counsel on appeal when counsel failed to raise a claim that the evidence was legally insufficient to sustain a murder conviction because the stab wound inflicted by the co-defendant was fatal even if Petitioner had not subsequently shot the deceased.
>
> 2. Petitioner was denied the effective assistance of counsel on appeal when counsel failed to raise a claim that the evidence was legally insufficient to sustain a murder conviction because the jury found that the co-defendant lawfully killed the deceased in self-defense.

Petitioner has abandoned his first ground for relief. See Petitioner's Response in Opposition to the Respondent's Summary Judgment Motion (Docket Entry No. 10).

Petitioner's recitation of the facts follows. Petitioner and his brother Raymundo were at a bar in Houston. They argued with some people. Petitioner got out of his truck carrying a gun, walked to a truck driven by Rosendo Rodriguez, and tapped on the window with the gun. Petitioner then saw Raymundo and Rogelio Mendez fighting in the parking lot, ran toward them, and fired once at Mendez, who was standing. Mendez fell to the ground, pulling Raymundo with him. Raymundo took a knife from his jacket pocket and began stabbing Mendez as the two

were fighting on the ground. Petitioner shot Mendez as he lay on his back and then grabbed him by the hair and shot him in the head at close range.

Petitioner testified as follows. While Petitioner was talking to Rodriguez, he saw two men running toward his truck. The closest man, Mendez, grabbed Raymundo and hit him in the head, knocking him to the ground. Mendez sat on top of Raymundo, hitting him. Petitioner obtained a gun from his truck and shot Mendez.

The court instructed the jury on self-defense as applied to Raymundo and on defense of a third person as applied to Petitioner. The jury acquitted Raymundo on the ground of self-defense but convicted Petitioner of murder.

II. THE SUMMARY JUDGMENT & AEDPA STANDARDS

A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the record, which the moving party believes demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, (1986). In considering a motion for summary judgment, a court must review the material factual issues and give the non-moving party the benefit of every reasonable inference with respect to the facts alleged by that party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") was signed into law. Pub. L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA amended the federal habeas corpus statutes to place these restrictions on applications for habeas corpus relief:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with

respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

.....

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (Supp. 1996).

III. PETITIONER'S ARGUMENT

Petitioner's contentions follow. Raymundo's acquittal on the ground of self-defense established that the homicide was justified. Petitioner's murder conviction violated due process because the jury finding that the homicide was justified meant that no crime was committed.

The Texas Court of Criminal Appeals recognizes that "inasmuch as two persons are necessary to a conspiracy, if two are tried and one is acquitted, the other must also be acquitted." Hustead v. State, 251 S.W. 1074, 1075 (Tex. Crim. App. 1922). This principle applies to substantive offenses. People v. Allsip, 74 Cal Rptr. 550 (Cal. App. 1969). In Allsip, two defendants were tried together for sexual assault and aiding and abetting each other. The jury acquitted one defendant of both counts; the other defendant was acquitted of sexual assault but convicted of aiding and abetting. The conviction was reversed because one defendant could not be convicted of aiding and abetting where the jury, by acquitting the co-defendant, determined that no crime

occurred. Self-defense and defense of another are harmonious, compatible theories, as "a finding that one had killed the victim in justification or self-defense would acquit the other as well." State v. Snodgrass, 346 N.W.2d 472, 477 (Iowa 1984).

Petitioner could not be convicted of murdering someone who was lawfully killed by a third person. Appellate counsel would have been successful had he raised this issue on appeal.

IV. ANALYSIS

A. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a petitioner must show: (1) that his lawyer's performance was deficient and (2) that this deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The Strickland standard applies on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000). A petitioner claiming ineffective-appellate counsel must show that (1) appellate counsel acted objectively unreasonably in failing to raise a particular issue on appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that defendant's appeal would have been successful before the state appellate court. Id.

Petitioner argues that because the jury found Raymundo not guilty by reason of self-defense, Petitioner's murder conviction violated due process. Petitioner maintains that the jury finding that Raymundo acted in self-defense means that the homicide was justified and that no crime was committed.

1. *The record does not show that the jury necessarily acquitted Raymundo based on self-defense.*

The record before this Court contains a jury charge and verdict in Raymundo Covarrubias's conviction in cause number 770220. HR, 86-101. The jury charge instructs the jury concerning self-defense and defense of a third party.

The charge also instructs the jury on criminal responsibility for the conduct of another if the defendant aids and abets the other person. The verdict form contains only two entries for the jury to choose from: (1)"We, the jury find the defendant, Raymundo Moran Covarrubias, not guilty." and (2) "We, the jury find the defendant, Raymundo Moran Covarrubias, guilty, as charged in the indictment." Id., 101. The jury foreman signed the first entry.

The parties argued self-defense during closing arguments. However, the record does not support Petitioner's claim that the jury necessarily acquitted Petitioner based on self-defense. Based on the jury charge and verdict form, the jury could have decided, among other reasons for their verdict, that the State failed to prove beyond a reasonable doubt that Raymundo killed Mendez or decided that Raymundo was justified in defending himself but Petitioner was not justified in defending Raymundo. Petitioner has not shown a genuine issue of material fact that the jury acquitted Raymundo based on self-defense—an essential part of Petitioner's ground for relief.

Petitioner's claim fails because he has not shown that the jury necessarily acquitted Raymundo on self-defense grounds or that the jury found the homicide was justified.

2. *Under the evidence, the jury's verdict could have been based on a conclusion that Raymundo was justified in using self-defense but Petitioner was not.*

Assuming that the jury acquitted Raymundo based on self-defense does not help Petitioner. The standard for insufficiency of the evidence in a state court conviction is "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Under this standard, the jury may disregard any evidence it chooses to disregard. The fact-finder can find not credible, and thus ignore, any evidence. Id. Any contradictory testimony does not affect the validity of the verdict. Id. Furthermore, the evidence can be sufficient to support a conviction under

Jackson even when it also supports a claim of innocence. Gibson v. Collins, 947 F.2d 780, 783 (5th Cir. 1991).

A reading of the record in light of Jackson shows that a rational trier of fact could have easily found that Raymundo was justified under Texas law in defending himself against Mendez and that Petitioner was not justified in shooting Mendez in defense of Raymundo. Jackson, 443 U.S. at 319. The Texas Court of Appeals (which cited Jackson in its opinion) found the evidence factually and legally sufficient for the jury to find that Petitioner was not justified in using deadly force against Mendez.

Assuming the jury acquitted Raymundo on self-defense, they certainly *could* have decided that whatever facts led them to this acquittal also applied to justify Petitioner's shooting of Mendez. However, Petitioner's argument—in effect that the court must acquit Petitioner because of Raymundo's acquittal—does not hold water. Petitioner's claim fails because he has not shown that the jury's acquittal of Raymundo on self-defense is factually inconsistent with Petitioner being guilty of murdering without legal justification.

3. *An acquittal of a defendant for self-defense does not legally require the acquittal of a co-defendant.*

"An accomplice is not entitled to a new trial or reversal just because a subsequently tried principal has been acquitted." Tucker v. State, 461 S.W.2d 630 (Tex.Cr.App.1970). Texas has more recently abolished the distinction between principals and accomplices. PENAL CODE ANN. § 7.01(c) (West 2003) ("All traditional

distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.").

Texas law allows the conviction of a defendant whose criminal responsibility is based on the conduct of another even where the other actor has been acquitted. TEX. PENAL CODE ANN. § 7.03 (West 2003) ("In a prosecution in which an actor's criminal responsibility is based on the conduct of another .... it is no defense ....that the person for whose conduct the actor is criminally responsible has been acquitted...."). Petitioner has no right to an acquittal even if he had been convicted merely on the conduct of Raymundo for which Petitioner was criminally responsible; much less an acquittal where he had been convicted based on his own conduct. Here, the case for requiring an acquittal based on a co-defendant's acquittal is weaker than the situation covered by the statute—Petitioner personally shot Mendez. See Singletary v. State, 509 S.W.2d 572, 578 (Tex. Crim. App.1974) (holding that the statute prevents invalidation of a conviction of an accomplice due to acquittal of principal).

There is no Constitutional violation rooted in the alleged inconsistency between Raymundo's acquittal on self-defense and Petitioner's conviction arising from the same killing. See Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir. 2003) (the "Constitution does not require that verdicts against an accomplice and his principal be consistent."); accord Hamling v. United States, 418 U.S. 87, 101 (1974) ("It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required."); see also United States v. Finch, 16 F.3d 228, 230 (8th Cir.1994).

The cases Petitioner cites do not help him. Hustead is inapposite because it involved a conviction for a conspiracy to commit the crime of theft. A conspiracy necessarily involves two or more people. As Petitioner quotes the opinion: "inasmuch as two persons are necessary to a conspiracy, if two are tried and one is acquitted, the other

must also be acquitted." Hustead, 251 S.W. at 1075. Our case involves two defendants who committed two separate acts, a stabbing and a shooting.

In Allsip, defendant Allsip was charged with sexually assaulting a female and aiding and abetting co-defendant Barnes with sexually assaulting the same female. Barnes was charged with sexually assaulting the female and aiding and abetting Allsip in sexually assaulting her. The two were tried together before the same jury. The jury acquitted Barnes of both counts. The jury could not reach a verdict on the sexual assault charge against Allsip and the court declared a mistrial on that count. The jury found Allsip guilty of aiding and abetting Barnes in the commission of the sexual assault. The state appellate court said that "[w]here the commission of a single crime is charged, it is clear that a jury cannot acquit the principal and yet find his codefendant guilty of being an accessory to the commission of the crime it found had not been committed." Allsip, 268 Cal. App. 2d at 831. That is, it does not make sense to convict Allsip of aiding and abetting Barnes in a sexual assault when Barnes was acquitted of that same sexual assault. The acquittal of Raymundo for stabbing Mendez could, under Allsip, possibly call into question a conviction of Petitioner for aiding and abetting Raymundo in stabbing Mendez. However, the jury in our case was presented evidence that Petitioner committed a crime based on his own conduct, *i.e.*, shooting Mendez.

Petitioner cites State v. Snodgrass, 346 N.W.2d 472 (1984), 476-78 (Iowa, 1984). In Snodgrass, a woman and her paramour were charged with killing the woman's husband. The State's theory was that the two defendants acted together in planning the murder. The defendants both claimed the other shot the husband, but in self defense. Both defendants sought a severance. The appeals court essentially said that the compatibility of the two defendant's justification defenses reduced concerns over prejudice from a joint trial. The language quoted by Petitioner about compatible defenses was made in the context of discussing whether a

joint trial would prejudice the defendants—not about inconsistent verdicts. Snodgrass is distinguishable from our case.

Petitioner's cases offered in support of his position are distinguishable. Furthermore, as state cases, they are not controlling in this Court. Petitioner's claim fails because he has not shown a Constitutional right to avoid a conviction based on the acquittal of a co-defendant in this kind of situation.

For the reasons explained above, counsel was not deficient for failing to claim on appeal that the evidence was legally insufficient to sustain a murder conviction because the jury found that Petitioner's co-defendant lawfully killed the deceased in self-defense. It follows that no prejudice resulted from this failure. Therefore, Petitioner did not receive ineffective assistance of appellate counsel.

B. AEDPA Review of the Assistance of Counsel Determination

The record before this Court does not raise a genuine issue of material fact that this Court can grant relief overcoming the restrictions in 28 U.S.C. § 2254(d), (e). Whether counsel was ineffective is a mixed question of law and fact and is controlled by the "unreasonable application" part of section 2254(d). See Moore v. Johnson, 101 F.3d 1069, 1075-76 (5th Cir. 1996). The state court's adjudication on the merits that appellate counsel was not ineffective is not contrary to and did not involve an unreasonable application of clearly established federal law under Strickland. 28 U.S.C. § 2254(d)(1). Under the record, the state habeas court's adjudication on assistance of counsel was not incorrect or erroneous, much less also unreasonable. See Williams v. Taylor, 529 U.S. 362, 411 (2000). This Court cannot grant habeas corpus relief.

The fact findings that are subsidiary to an ineffective assistance of counsel determination and implicitly underlie that determination are fact questions governed by 28 U.S.C. 2254(e)(1). See Black v. Collins, 962 F.2d 394, 405-06 (5th

Cir. 1992) (discussing a prior version of § 2254(d)). The state habeas findings are presumed correct unless rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). Petitioner has not overcome this presumption of correctness. Therefore, this Court is also precluded from granting relief on the ineffective assistance ground because the state habeas court's explicit and implicit fact findings concerning counsel's effectiveness have not been rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The record before this Court does not raise a genuine issue of material fact that appellate counsel was ineffective under the deficient performance prong or the prejudice prong of Strickland. The summary judgment record does not raise a genuine issue of material fact that this Court has authority to grant federal habeas corpus relief under 28 U.S.C. § 2254(d), (e).

V. CONCLUSION

The record before this Court does not raise a genuine issue of material fact that Petitioner is in custody in violation of the Constitution. Respondent is entitled to summary judgment on Petitioner's habeas corpus claim raised in this action.

Respondent's Motion for Summary Judgment [Docket Entry No. 6] is GRANTED and this case is DISMISSED with prejudice under Rule 56. All other pending motions and requests for relief are DENIED.

This Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right. The issues raised here are not debatable among jurists of reason, could not be resolved in a different manner, and do not deserve encouragement to proceed further. Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). This Court finds that a Certificate of Appealability should not issue in this case.

SIGNED at Houston, Texas, on this 9th day of March, 2006.

/s/ David Hittner
DAVID HITTNER
United States District Judge